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No. 94-431

In the Supreme Court of the United States

OCTOBER TERM, 1994

JAMES D. RYDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether actions taken pursuant to statutory authority by the United States Coast Guard Court of Military Review should be accorded de facto validity.

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OPINIONS BELOW

The opinion of the United States Court of Military Appeals (now called the United States Court of Appeals for the Armed Forces) (Pet. App. 1a-10a) is reported at 39 M.J. 454. The initial opinion of the United States Coast Guard Court of Military Review (Pet. App. 11a-22a) is reported at 34 M.J. 1077. The opinion of the Coast Guard Court of Military Review upon reconsideration (Pet. App. 23a-25a) is reported at 34 M.J. 1259.

JURISDICTION

The judgment of the Court of Military Appeals was entered on June 23, 1994. The petition for a writ of certiorari was filed on September 9, 1994. The juris-

diction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1993).

STATEMENT

1. The Coast Guard Court of Military Review is composed of five appellate judges, three of whom are active duty commissioned officers in the pay grade of O-6. See *United States* v. *Carpenter*, 37 M.J. 291, 293-295, 300 (C.M.A. 1993), petition for cert. pending, No. 93-676 (filed Oct. 29, 1993). The other two members of the court are civilians. Those two judges—Chief Judge Joseph H. Baum and Associate Judge Alfred F. Bridgman, Jr.—are retired commissioned officers who attained the pay grade of O-6 prior to retirement. *Ibid.*; *United States* v. *Kovac*, 36 M.J. 521, 525 (C.G.C.M.R. 1992), aff'd mem., 39 M.J. 29 (C.M.A. 1993).

Before January 15, 1993, members of the Coast Guard Court of Military Review were appointed by the General Counsel of the Department of Transportation, who is also the Judge Advocate General for the United States Coast Guard. *Carpenter*, 37 M.J. at 294.[1] On that date

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[1] The Judge Advocate General's authority to "establish a Court of Military Review" rests upon Article 66(a) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 866(a). In *Weiss* v. *United States*, 114 S. Ct. 752 (1994), this Court held that "those serving as military judges must be appointed pursuant to the Appointments Clause." *Id.* at 757. With respect to commissioned officers serving as military judges, the Court held, the initial appointment as a commissioned officer is constitutionally sufficient; no further appointment pursuant to the Appointments Clause is a prerequisite to an officer's assignment to a military court. *Id.* at 758-760. The Court noted that "[t]he constitutionality of the provision allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question. It is not at issue here." *Id.* at 757 n.4 (citation omitted).

the Secretary of Transportation issued a memorandum stating that "[t]he assignment of appellate military judges to the Coast Guard Court of Military Review, as reflected in the General Counsel's memo of April 20, 1992, is adopted this date as judicial appointments of my own." *Id.* at 300; see also *id.* at 294 n.1.[2]

2. Petitioner, a member of the United States Coast Guard, was convicted on 11 specifications of marijuana use, three specifications of use of lysergic acid diethylamide (LSD), one specification of cocaine use, one specification of distributing LSD, one specification of soliciting Coast Guard personnel to use LSD, and one specification of soliciting Coast Guard personnel to distribute LSD, in violation of Articles 112a and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a and 934. He was sentenced to five years' confinement, forfeiture of $699.00 per month for 60 months, reduction to the lowest enlisted pay grade (E-1), and a dishonorable discharge from the Coast Guard. Pet. App. 2a. The convening authority reduced the period of confinement to three years and the period of forfeitures to 36 months, but approved the sentence in all other respects. *Ibid.*

Petitioner appealed to the Coast Guard Court of Military Review, contending that (1) his convictions had resulted from the improper admission of evidence, (2) his sentence was disproportionately harsh, and (3) he had been denied effective assistance of counsel. See Pet. App. 12a-13a. When petitioner's appeal was heard, the members of the court were serving pursuant to

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[2] Under 49 U.S.C. 323(a), "[t]he Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation and may prescribe their duties and powers."

appointments by the General Counsel. The court affirmed petitioner's convictions and sentence. See *id.* at 11a-22a. In response to petitioner's motion, the court ordered reconsideration of its decision. See *id.* at 24a. On reconsideration, petitioner argued, *inter alia*, that the method of assigning the members of the Court of Military Review violated the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. The court rejected that contention on the authority of *United States* v. *Prive*, 35 M.J. 569 (C.G.C.M.R. 1992), aff'd mem., 39 M.J. 28 (C.M.A. 1993). Pet. App. 25a.

3. Approximately one year later, the Court of Military Appeals held in *Carpenter* that the method by which the Chief Judge of the Coast Guard Court of Military Review had been selected before January 15, 1993, violated the Appointments Clause. See 37 M.J. at 294-295. The court concluded, however, that the constitutional flaw in the appointment process did not require reversal of Carpenter's conviction and sentence. It explained:

> Just as the acts of the federal election commissioners were accorded *de facto* validity in *Buckley v. Valeo*, 424 U.S. [1,] 142 [(1976) (per curiam)], we hold that the judicial acts of the Chief Judge are entitled to *de facto* validity. Accordingly, we hold that the decision of the Court of Military Review in this case is valid, notwithstanding the defective appointment of the Chief Judge.

Id. at 295.

In this case, petitioner argued in the Court of Military Appeals that his convictions and sentence should be overturned on the ground that the civilian members of the Court of Military Review had been unconstitutionally appointed. Relying on *Carpenter*, the Court

of Military Appeals rejected that contention. See Pet. App. 2a n.1. The Court of Military Appeals also rejected petitioner's contention that his convictions had been based on improperly admitted evidence. See *id.* at 1a-10a.

DISCUSSION

1. Petitioner challenges the Court of Military Appeals' determination to accord de facto validity to the actions of the Coast Guard Court of Military Review in this case. Pet. 9-15. On October 11, 1994, this Court heard argument in *Federal Election Commission* v. *NRA Political Victory Fund*, No. 93-1151. The second question presented in that case is whether actions previously taken by the Federal Election Commission should be accorded de facto validity if the Court determines that the composition of the Commission, which includes the Secretary of the Senate and the Clerk of the House of Representatives as ex officio, non-voting members, violates constitutional separation-of-powers principles. Because the Court's resolution of that issue could affect the analysis in this case, the petition in this case should be held pending this Court's decision in *NRA Political Victory Fund*, and disposed of as appropriate in light of that decision.[3]

2. If this Court decides *NRA Political Victory Fund* without addressing the second question presented in that case, the petition in the instant case should be denied.

a. The Court of Military Appeals in *Carpenter* relied upon this Court's decision in *Buckley* v. *Valeo*, 424 U.S.

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[3] We note that two other petitions for certiorari raising the same issue as is presented in the instant case are currently pending before the Court. See *Carpenter* v. *United States*, No. 93-676 (filed Oct. 29, 1993); *Clark* v. *United States*, No. 93-966 (filed Dec. 20, 1993).

1, 142 (1976) (per curiam), which held that the prior acts of the Federal Election Commission should be accorded de facto validity despite the constitutional flaw in the manner of the Commissioners' appointment. See 37 M.J. at 295. The decision in *Buckley* was in keeping with this Court's longstanding application of the "de facto officer" doctrine. See, *e.g.*, *Norton* v. *Shelby County*, 118 U.S. 425, 441-449 (1886); *Ball* v. *United States*, 140 U.S. 118, 128-129 (1891); *McDowell* v. *United States*, 159 U.S. 596, 601-602 (1895); *Waite* v. *Santa Cruz*, 184 U.S. 302, 323 (1902). Under that doctrine, "[a] person actually performing the duties of an office under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned." *United States ex rel. Doss* v. *Lindsley*, 148 F.2d 22, 23 (7th Cir.), cert. denied, 325 U.S. 858 (1945). The de facto officer doctrine "is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby." *Norton*, 118 U.S. at 441. Accord *EEOC* v. *Sears, Roebuck & Co.*, 650 F.2d 14, 17 (2d Cir. 1981) ("The *de facto* officer doctrine was developed to protect the public from the chaos and uncertainty that would ensue if actions taken by individuals apparently occupying government offices could later be invalidated by exposing defects in the officials' titles.").

In one significant respect this Court's de facto officer doctrine cases are distinguishable from more recent decisions such as *Buckley*. Where the de facto officer doctrine has been applied, the Court has typically declined to address the legal validity of the officer's appointment or election, on the theory that the purported unlawfulness of the officer's selection furnished no basis for a "collateral attack" on his acts in office. *Ball*, 140 U.S. at 129; see also *McDowell*, 159 U.S. at 601-602;

Lindsley, 148 F.2d at 23; *Ryan* v. *Tinsley*, 316 F.2d 430, 432 (10th Cir.), appeal dismissed, cert. denied, 375 U.S. 17 (1963). In more recent decisions, by contrast, the Court has addressed and decided issues concerning the legality of the challenged officers' appointment or exercise of power, but has determined that its decision should be given prospective effect only. See, *e.g.*, *Buckley* v. *Valeo*, *supra*; *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (plurality opinion); *id.* at 92 (Rehnquist, J., concurring in the judgment). In *Northern Pipeline*, for example, the plurality explained that retroactive application of its holding "would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." *Id.* at 88; see also *id.* at 92 (Rehnquist, J., concurring in the judgment).

The Court of Military Appeals' decision not to overturn petitioner's convictions is consistent with the rationale of those cases. In this case, as in those, both "policy and necessity," *Norton*, 118 U.S. at 441, support the Court of Military Appeals' decision to accord de facto validity to the prior rulings of the Coast Guard Court of Military Review. Petitioner does not maintain that the method of appointing judges to the Court of Military Review before the Secretarial appointment of January 15, 1993, had an actual adverse effect on the outcome of his case. And unlike the commissioners in *Norton*, the judges in petitioner's case were not "usurpers," without authority or function. *Norton*, 118 U.S. at 441-449. They occupied de jure offices and performed the well-defined functions of those offices. Because petitioner has failed to demonstrate that the system of assigning appellate judges that was in place when his appeal was heard by the Court of Military Review prejudiced his right to

receive a fair and impartial trial and appeal, the court's affirmance of his convictions and sentence should be accorded de facto validity.

b. In any event, the issue presented in the petition does not warrant this Court's review because it is of no continuing importance. The Secretary of Transportation (a "Head of Department" within the meaning of the Appointments Clause) has expressly adopted the appointments previously made by the Department's General Counsel. For that reason, the Appointments Clause issue is one that will not affect any new cases, even within the relatively small Coast Guard military justice system.[4]

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[4] Petitioner suggests (Pet. 7 n.3) that the Secretary's January 15, 1993, appointments may be invalid. He asserts that "[t]he Secretary of Transportation has no explicit authority under the law to appoint the judges of the Court of Military Review"; that the UCMJ "authorizes the Judge Advocate General of each service to appoint the judges of the service Court of Military Review"; and that "[t]he legal provision which generally permits the Secretary to appoint officers of the Department of Transportation should not be applied to support the Secretary's action." Pet. 8 n.3. As he acknowledges, *ibid.*, petitioner's attack on the Secretary's authority is not squarely presented in this case. In any event, it is without merit. The Secretary of Transportation is expressly authorized to "appoint and fix the pay of officers and employees of the Department of Transportation and [to] prescribe their duties and powers." 49 U.S.C. 323(a). It is, moreover, the well-established duty of the federal courts to "construe [a] statute to avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). Whether or not the UCMJ might otherwise be construed to create an implied exception to the Secretary's appointment authority, it surely should not be so construed if appointment by the Secretary is constitutionally required.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Federal Election Commission* v. *NRA Political Victory Fund*, No. 93-1151 (argued Oct. 11, 1994), and disposed of as appropriate in light of that decision. If this Court decides *NRA Political Victory Fund* without addressing the second question presented in that case, the petition should be denied.

Respectfully submitted.

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